No. 14079.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Lessie B. Henry and Mildred Louise McDavis,
Appellants,

vs.

United States of America,
Appellee.

No. 22920 CD.

Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Hon. William M. Byrne, District Judge.

REPLY BRIEF OF APPELLANTS.

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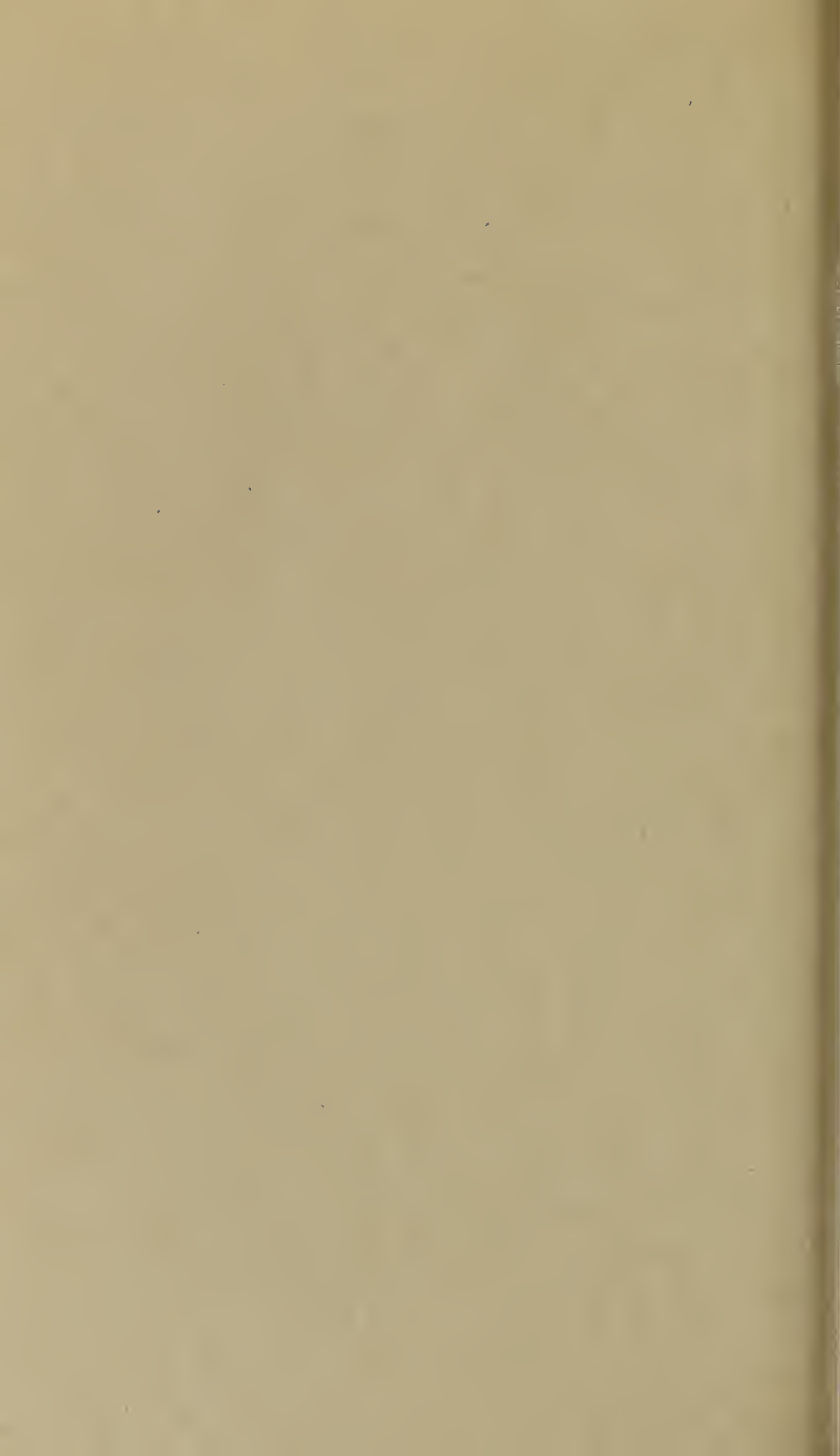

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REPLY BRIEF OF APPELLANTS.

Come now the appellants and for reply to the brief of the appellee herein, respectfully call the Court's attention to these matters:

ARGUMENT.

I.

Entrapment.

The Government contends that in this case Stafford merely made it possible for the appellants to commit the offense. The Government contends that the "corrupt intent" was originated in the minds of the appellants and

not by suggestion of the Government agents. Under the cases cited both by ourselves and the Government in the briefs on file, it is well established that entrapment lies where people are induced to commit public offenses—where they are lured into a trap. This is against sound public policy. (*Butts v. United States,* 273 Fed. 35, 38; *Lufty v. United States,* 198 F. 2d 760; *Sam Yick v. United States* (C. C. A. 9), 240 Fed. 60.)

Frank J. Stafford testified he was employed by the Government of the United States as an undercover agent for the Narcotic Division, and that he was being paid for such services [Rep. Tr. pp. 30, 31]. That this man is a Government agent there can be no question, and our contention that he was attempting to lure people into the commission of violations of federal laws we think is amply supported by the evidence. It should be borne in mind that this same Frank Stafford was a witness for the Government in the case of *United States of America v. James Boyd Brown,* a case which arose in the same Southern District of California, and bears case No. 22940, and which case came to this Court on appeal and was by this Court reversed. It bore No. 14132 in this Court. May we also point out that he was a witness in a narcotics case in a matter presently before this Court on appeal, in the matter of *Leo Williams, Appellant v. The United States of America, Appellee,* bearing this Court's No. C. C. A. 14177.

Stafford testified that he had known the appellant Lessie B. Henry for three and one-half years; that he had known Jennell James for about three and one-half years [Rep. Tr. pp. 31, 32]; that he had known the appellant Mildred Louise McDavis for a year and a half [Rep. Tr. p. 34]. That he was acquainted with the resi-

dence of the defendant Henry's mother, and that he himself went there [Rep. Tr. pp. 35, 36]; that he waited at the address at 2945 Eleventh Avenue for Mr. Henry to arrive for about an hour, at which time he talked and visited with Jennell James awaiting Henry's arrival. He, the Government agent, Stafford, who was a confessed user of drugs, attempted to get the girl at the house to call a number and find Henry for him [Rep. Tr. p. 38]. It was he, Stafford, who first proposed to Henry that Henry obtain for Stafford some heroin [Rep. Tr. p. 44]. At the very time he was contacting Henry, other Government agents were watching Stafford while he attempted to set up the trap. It was Stafford who pursued Henry, and it was Stafford who was attempting to induce Henry to break the law. It should be borne in mind that Stafford was asked by a Government agent to go to work for the Government; he thought it was Mr. Ross, the agent who testified in this case [Rep. Tr. pp. 71, 72]. This whole plan was conceived in the minds of the Government agents, and Stafford was used in this and other cases to attempt to carry out their plans of entrapment. As we have heretofore said, Stafford knew the appellants, Lessie B. Henry and Mildred Louise McDavis, and the defendant Jennell James, and had known them for a substantial period of time. For instance, he had known Mildred McDavis over a period of time, and in the year and a half prior to his testifying, had seen her fifteen or twenty times [Rep. Tr. p. 78]. It should be borne in mind that the Government agent, Stafford, was known as "Sleepy"; had known appellant Henry for some years, and that he often visited at the home of Henry's mother. The mother testified that she had been friendly with Stafford, and at the time of Stafford's visit to the house there was some conversation

in which Stafford said he wanted to paint the house, and he, Stafford, also wanted the mother's son, Henry, to buy a house from him [Rep. Tr. p. 530].

We respectfully suggest that the long period of acquaintanceship between Stafford (Sleepy), the Government undercover agent, with the appellants, Henry and McDavis, and with the defendant Jennell James and with the appellant Henry's mother, and his frequent visits to the home of the appellant Henry's mother, made an ideal arrangement for the use of Stafford by Ross and other Government agents to entrap the appellants. We think the evidence susceptible of only one reasonable interpretation, and that the conduct of the Government agents was entrapment. The long period of friendship between these parties rebuts the Government's contention that the Government's activities merely "afforded" the appellants an opportunity to violate the law.

We should call the Court's attention to the statement in appellee's brief (p. 9) to the effect that narcotics agent Ross discovered a cache of heroin on February 16, 1953, located in a box of groceries in the kitchen of a house at 2945 Eleventh Street. This is a clear misstatement of the evidence, for there is no such evidence. We assume that counsel did this mistakenly. The evidence is to the effect that Agent Ross discovered a package with a label thereon, "Spotless Freezer Bags. Excellent for Home Freezing." They were plastic bags that you put vegetables in in a refrigerator or freezer. He testified that he found these bags in a box of groceries at the Eleventh Avenue address, which box was on the floor among other boxes of pots and pans. He then testified in answer to the question, "And are these bags in the same condition as when you first observed them? A. Yes. Q. I mean there

was nothing in them at the time? A. No." You will thus see that all he found was some empty plastic bags. A statement to the effect that he found a cache of heroin in the box of groceries is inconceivable from the sworn testimony of the witness himself [see Rep. Tr. pp. 239, 240].

II.

Insufficiency of the Evidence.

We again renew our contention that the evidence is insufficient to support Counts 1 and 2 of the Indictment charging transportation. It has been and is our clear-cut contention that there was no clear-cut evidence to support the charge of transportation. There was no evidence upon which a Court could reasonably conclude that guilt had been established beyond a reasonable doubt.

We are not unmindful of the case of *Parmagini v. United States,* 42 F. 2d 721, cited by the Government in its brief, and the rules of law therein discussed. However, the evidence here is plainly insufficient, it is our contention.

The Government also relies upon the *Parmagini* case, *supra,* for its contention that no prejudice was worked upon the appellants because the sentences run concurrently. We realize that in the *Parmagini* case that statement was made, but rather severe sentences were meted out in this case against the appellants as compared with the judgment against Jennell James, and we do not believe it can safely be said that the Court did not consider the number of counts that were involved in pronouncing such a severe sentence. The mere fact that he made the sentences run concurrently is of little help to us. We think that the pronouncement of the Court, with all due

respect to it, was a very unrealistic approach to the matter in hand. We respectfully call the Court's attention to the case of *People v. Branch,* 119 A. C. A. 564, 260 P. 2d 27, at page 31, where the Court had this to say:

> "(9) The Attorney General seeks to avoid the effects of this error by pointing out that, since the sentences on the two counts have been made to run concurrently, no possible prejudice can result from the judgment. This is an unrealistic approach. The dual judgment may very well adversely affect appellant's rights when he comes before the proper authorities to have his definite term fixed. This factor was sufficient to require a reversal in People v. Kehoe, 33 Cal. 2d 711, 204 P. 2d 321; People v. Roberts, 40 Cal. 2d 482, 254 P. 2d 501; People v. Knowles, 35 Cal. 2d 175, 217 P. 2d 1; People v. Craig, 17 Cal. 2d 453, 110 P. 2d 403."

We are quite satisfied that the dual judgments in these cases may very well adversely affect these appellants' rights. They have been prejudiced.

Conclusion.

Wherefore, appellants respectfully pray that for the reasons urged, these judgments appealed from be reversed.

Respectfully submitted,

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